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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

RUBEN CASTRO,

Defendant and Appellant.

2d Crim. No. B301602
(Super. Ct. No. KA058520)
(Los Angeles County)

Ruben Castro appeals a postjudgment order denying his petition to vacate a 2003 second degree murder conviction and 31-year-to-life state prison sentence. (Pen. Code, § 1170.95, subd. (d)(3).)¹ The trial court found that appellant was not entitled to resentencing because he was a major participant in a fatal gang stabbing and acted with reckless indifference to human life. (§§ 189, subd. (e)(3); 1170.95, subd. (d)(3).) We affirm.

Facts and Procedural History

In 2003, a jury convicted appellant of second degree murder (§ 187, subd. (a)), mayhem (§ 203), assault with force likely to cause great bodily injury (§ 245, subd. (a)(1)), and

¹ All further statutory references are to the Penal Code.

attempted manslaughter (§§ 664/192, subd. (b)(1)) with special findings that the offenses were committed for the benefit of a street gang (§ 186.22, subd. (b)(1)). Appellant was sentenced to a determinate term of 16 years eight months state prison plus an indeterminate term of 15 years to life. In 2004, we affirmed the judgment of conviction. (*People v. Castro* (Dec. 15, 2004, B170079) [nonpub. opn.].)

Petition for Resentencing

On January 23, 2019, appellant filed a petition for resentencing. (§ 1170.95, subd. (a).) The trial court found the petition made a prima facie showing for resentencing eligibility, appointed counsel for appellant, issued an order to show cause, and conducted an evidentiary hearing in which no testimony was received. (§ 1170.95, subd. (c).) The trial court considered the record of conviction and our 2004 opinion affirming the judgment which showed the following:

In 2002, appellant approached Robert “Zane” Baca outside a Tommy’s Burgers in Rowland Heights and walked back to a group of 10 to 15 Hispanic men standing nearby. One of the men, Gilbert Remijio, an active member of the Rowland Heights Wicked Insane Dogs gang (W.I.D.), stepped forward and confronted Baca. Appellant and the other men stood behind Remijio as he waved his hands at Baca and said: “What the fuck are you looking at?” Baca held his arms up with his palms facing out. Appellant warned Baca and his friend Christopher Sorto, “You guys want to get stuck?” Remijio or a male standing behind Remijio threw the first punch and the group attacked Baca and Sorto.

Sorto was hit in the eye with brass knuckles, pepper sprayed, and stabbed in the arm and torso. One of the assailants

yelled, “We don’t stop when you fuck with W.I.D.” Sorto identified appellant as the one who attacked him with the pepper spray.

Baca was also attacked. George Yaghoubian tried to rescue Baca, but Remijio cut Yaghoubian’s left forearm above the wrist. Appellant and his cohorts hit Baca, knocking him to the ground. The restaurant security guard saw appellant hit and kick Baca. Baca could not get up. Remijio kneeled next to Baca and thrust a knife into his groin, severing the femoral artery and killing Baca.

Jose Hernandez, a restaurant patron, tried to rescue Baca and grabbed Remijio by his jersey. Remijio turned and stabbed Hernandez in the back. Hernandez tried to grab Remijio, but appellant pulled Remijio away and the two fled to the sound of police sirens.

At the hearing on the resentencing petition, the prosecution agreed that appellant was not the actual killer and the 2002 jury was instructed on the natural and probable consequences doctrine, a murder theory that was abolished by Senate Bill No. 1437 (2017-2018 Reg. Sess.) (SB 1437). The trial court framed the issue as follows: “Whether the prosecution can establish beyond a reasonable doubt that the [appellant] is guilty of second degree murder under a theory still available under the law.” The court was referring to SB 1437 (Stats. 2018, ch. 15, § 1) which amends sections 188 and 189 to provide that an aider and abettor can be convicted of second degree murder if the defendant was a major participant in the underlying felony and acted with reckless indifference to human life. (§§ 189, subd. (e)(3); 1170.95, subd. (a)(3).)

The trial court, after reviewing the evidence, found the prosecution had made such a showing and that appellant, if tried today, would be guilty of implied malice, second degree murder. The court explained why. Before Baca was stabbed in the groin, appellant said, “You guys want to get stuck?” The trial court found it was circumstantial evidence that appellant knew his cohorts were armed and knew that a fight was imminent and could result in Baca and Sorto being stabbed. After Sorto was hit in the eye with the brass knuckles and stabbed in the arm and torso, appellant and his cohorts focused on Baca, hitting and kicking Baca. Baca was knocked to the ground and defenseless. Remijio knelt down and stabbed him. The trial court found that appellant “actively participated in the murder of the victim by fighting with the victim while on the ground” and “aided and abetted the commission of that murder.” Although the jury returned a verdict for second degree murder based on the natural and probable consequences doctrine, the trial court found that “the People have proved beyond a reasonable doubt that [appellant] could be convicted of murder under the current state of the law. . . . [T]he petition is denied.”

Appellant filed a motion for reconsideration based on, among other things, police report excerpts and the preliminary hearing transcript. The trial court considered the new evidence and denied the motion.

Standard of Review

Where the trial court decides disputed facts to a resentencing statute, the factual findings are review for substantial evidence, and the application of those facts to the statute is reviewed de novo. (See *People v. Sledge* (2017) 7 Cal.App.5th 1089, 1095–1096 [Proposition 47 resentencing

petition].) Our analysis focuses on whether appellant could be convicted of second degree murder based on the post-January 1, 2019 definition of second murder, which requires that he was a major participant in the stabbing and acted with reckless indifference to human life. (See § 1170.95, subd. (d)(2).)

Implied Malice

Before SB 1437 was enacted, the felony-murder rule and the natural and probable consequences doctrine were exceptions to actual malice, a necessary element for the crime of murder. (§ 187, subd. (a) [defining murder].) SB 1437 was enacted “to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, *or was not a major participant in the underlying felony who acted with reckless indifference to human life.*” (See Stats. 2018, ch. 1015, § 1(f), italics added; *People v. Ramirez* (2019) 41 Cal.App.5th 923, 931.) Malice may be express or implied (§ 188, subd. (a)) and is established where the defendant is the actual killer or acted with intent to kill. The third category of actors described in SB 1437 - major participants in the underlying felony who act with reckless difference to human life - fits the implied malice paradigm. Malice is implied “when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.” (§ 188, subd. (a)(2).) Implied malice has “both a physical and a mental component. The physical component is satisfied by the performance of “an act, the natural consequences of which are dangerous to life.” [Citation.] The mental component is the requirement that the defendant “knows that his conduct endangers the life of another and . . . acts with a

conscious disregard for life.” . . . ” (*People v. Chun* (2009) 45 Cal.4th 1172, 1181 (*Chun*).)

“Want to get Stuck?” - a friendly warning or threat?

Appellant argues that he had a friendly talk with Baca and the “You guys want to get stuck?” remark was a warning, not a threat. Actions speak louder than words. After appellant spoke to Baca, he rejoined his cohorts, the newly formed Rowland Heights Wicked Insane Dogs gang. A hostile confrontation ensued. Remijio yelled “What the fuck are you looking at?” and waived his hands in front of Baca’s face. A Hispanic male standing behind Remijio said, “Why the hell are you messing with my little homey for?” Knowing that his cohorts were armed with knives, appellant shouted “You guys want to get stuck?” A gang expert testified that it was an immediate threat and meant “Look at what we are going to do. Watch us.” In the context of a newly formed gang defending its territory, it was call to arms against outsiders who had no weapons.

What ensued was a vicious attack. Sorto was hit in the eye with brass knuckles, pepper sprayed, and stabbed in the right wrist and torso. Someone yelled “We don’t stop when you fuck with W.I.D.” Appellant was not a clueless bystander. Sorto said appellant used the pepper spray. After Sorto and his friend Yaghoubian were stabbed, the group focused their attack on Baca.

Witness Hernandez said that appellant was “boxing” and fighting Baca. After Baca was knocked to the ground, appellant hit and kicked him, disabling him. It cleared the way for Remijio, who knelt down (an unusual position to be in a fist and knife fight) and stabbed Baca in the groin, Hernandez tried to pull Remijio off and was stabbed in the back. Hernandez said

that appellant was not trying to stop the fight or save Baca, and that practically everybody in the group had weapons. The evidence clearly showed that appellant was a major participant in the gang attack and stabbing.

The Malignant Heart

Taking his cue from a line of death penalty cases, appellant claims the prosecution failed to prove he acted with reckless indifference to human life, i.e., implied malice or what the Legislature calls “an abandoned and malignant heart.” (§ 188, subd. (a)(2).) Being a major participant in a dangerous felony and acting with reckless indifference to human life often overlaps. (*People v. Clark* (2016) 63 Cal.4th 522, 614-615 (*Clark*).) In *People v. Banks* (2015) 61 Cal.4th 788, our Supreme court set forth a non-exclusive list of factors in determining whether the defendant was a major participant: defendant’s role in planning the criminal enterprise; his role in supplying or using lethal weapons; his awareness of the dangers posed by the crime; his presence at the scene; his actions or inactions in the death; and what defendant did after lethal force was used. (*Id.* at p. 803.) “No one of these considerations is necessary, nor is any one of them necessarily sufficient. All may be weighed in determining the ultimate question, whether the defendant’s participation ‘in criminal activities known to carry a grave risk of death’ [citation] was sufficiently significant to be considered ‘major’ [citations].” (*Ibid.*)

In *Clark, supra*, 63 Cal.4th 522, our Supreme Court described the reckless indifference to life factors: defendant’s knowledge that weapons would be used; how the weapons were used; the number of weapons used; defendant’s proximity to the crime, his opportunity to stop the killing or aid the victims; the

duration of the crime; defendant's knowledge of the killer's (accomplice's) propensity to kill; and defendant's efforts to minimize the possibility of violence during the crime. (*Id.* at pp. 616-623; see *In re Taylor* (2019) 34 Cal.App.5th 543, 546 [*Banks* and *Clark* "clarified" what it means for an aiding and abetting defendant to be a major participant who acts with reckless indifference to human life].)

Appellant knew his cohorts were armed, stood behind Remijio as Baca was threatened, and taunted Baca and Sorto with the "You guys want to get stuck?" challenge. Appellant complains there are discrepancies in the testimony about the color of assailant's shirts/jerseys and who said what, but the evidence clearly shows that appellant did more than just watch. Appellant made the gang challenge and assisted his cohorts as the victims were stabbed, brass knuckled, pepper sprayed, hit and kicked. After Baca was knocked to the ground, appellant kicked him and disabled him for the coup de grace by Remijio. Implied malice has "both a physical and a mental component. The physical component is satisfied by the performance of "an act, the natural consequences of which are dangerous to life." [Citation.] The mental component is the requirement that the defendant "knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life." . . ." (*Chun, supra*, 45 Cal.4th at p. 1181.)

The evidence shows all of that, and more. After Remijio stabbed Baca in the groin and stabbed Hernandez in the back, appellant's only concern was to get Remijio out of there. Hernandez said that appellant pulled Remijio away and walked "away calling me shit." Appellant's failure to assist Baca or seek medical help was compelling evidence of an abandoned and

malignant heart. (§ 188, subd. (a)(2); *People v. Solis* (2020) 46 Cal.App.5th 762, 774.) Reckless indifference “encompasses a willingness to kill (or to assist another in killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his actions.” (*Clark, supra*, 63 Cal.4th at p. 617.)

Disposition

The judgment (order denying petition for resentencing) is affirmed.

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YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Victor D. Martinez, Judge

Superior Court County of Los Angeles

Vanessa Place, under appointment by the Court of
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters,
Chief Assistant Attorney General, Susan Sullivan Pithey, Senior
Assistant Attorney General, Charles S. Lee, Kathy S. Pomerantz,
Deputy Attorneys General, for Plaintiff and Respondent.